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March 1, 2010

To: Senator Ed Meyer and Representative Richard Roy, Co-Chairs, and  
members of the Environment Committee

From: Bill Ethier, CAE, Chief Executive Officer

Re: RB 205, AAC Enhancements to the Inland Wetlands and Watercourses  
Act

**The HBA of Connecticut is a professional trade association with 1,100 member firms statewide, employing tens of thousands of Connecticut citizens. Our members are residential and commercial builders, land developers, home improvement contractors, trade contractors, suppliers and those businesses and professionals that provide services to our diverse industry. We estimate that our members build 70% to 80% of all new homes and apartments in the state.**

**We strongly oppose RB 205 as unnecessary under the case law. RB 205 is a poor solution in search of a nonexistent problem. It creates uncertainty for property owners, business, housing and economic development. And it adds unhelpful, additional workloads to local inland wetland commissions.**

Section 1 of the bill amends the preamble or purposes section of the inland wetlands and watercourses act by adding language "to preserve and to prevent the despoliation and destruction of" wetlands and watercourses. **Section 1 is completely unnecessary as this purpose has been confirmed by the Supreme Court in the 2009 Unistar Properties case (see attached).** Moreover, future courts may presume that the legislature meant something different from how previous courts have interpreted the law. **Changing statutes to confirm current understanding of the law is very dangerous business.**

Section 2, adds the language "to preserve and to prevent the despoliation and destruction of" wetlands and watercourses to a different section of the act (22a-42) (again, already noted to be the purpose by Unistar Properties, but section 22a-42 does not provide the balancing language of the preamble. Therefore, **section 2 could empower local wetland commissions and the courts to not consider balancing wetland protection with the economic growth of the state or the use of its land. Environmental laws are important but they must be balanced with other societal needs and section 2 should be deleted.**

**Section 3 mandates that local wetland agencies "shall consider all evidence brought before" them. This doesn't make sense. What if the evidence that has nothing to do with the application? Why waste the commission's, applicant's and everyone else's time? What if the evidence clearly, under court rules, would not meet the court's substantial evidence test? Should not the local agency have some discretion to limit the evidence brought before it? This proposal was created several years ago by environmental**

**advocates who do not understand substantial evidence rules and the holdings in several court cases. See the attached for how the courts have applied the substantial evidence rule to wetland cases, including the August 2009 decision in Unistar Properties, upholding a local wetland agency's denial of a wetland permit for a residential subdivision.**

**It is the Unistar Properties case, which confirmed the denial of a permit for a subdivision, and its discussion of both the purposes section of the act and the evidence rules in wetland cases that led to placing this bill on the committee's agenda for a vote to not draft the bill. The committee's lack of knowledge of the Unistar Properties case resulted in that item being pulled from the agenda and now being considered at this public hearing.**

**We now urge the co-chairs to not place RB 205 on an agenda for a vote. If it is, we strongly urge the committee to not pass RB 205 since it is unnecessary, unhelpful to the consideration of applications and will add both workload and litigation costs to municipal wetland agencies.**

Thank you for the opportunity to comment on this legislation.

Attachment (outline of the Court's treatment of the substantial evidence rule in wetland appeals and the purposes section of the inland wetlands and watercourses act)

What the courts have said about the “substantial evidence” rule in wetland cases and about the preamble or purposes section of the act:

Advocates for RB 123 and RB 205 (and similar bills from prior years) are upset about the Toll Brothers and River Bend cases, but don’t mention the more recent Finley case. In all three decisions, the court found there was not substantial evidence to support the local agency’s decision. In Toll Brothers and River Bend, the Court overturned a local agency’s denial of permits; in Finley, the Court overturned a local agency’s approval of a permit. And in the 2009 Unistar Properties case, the Court held there was substantial evidence to uphold a local agency’s denial of a wetland permit for a subdivision and confirmed the legislature’s broad purpose for the inland wetlands and watercourses act.

River Bend Associates, Inc. v. Simsbury Conservation & Inland Wetlands Commission, 269 Conn. 57, 75, 78 (2004) (overturning a denial of a wetlands permit):

“[T]he trial court misapplied the substantial evidence test by failing to determine whether the defendant’s reasons for denial were supported by substantial evidence in the record that the activities proposed by the plaintiffs would result in an adverse impact to the wetlands and watercourses on the site.

....  
Determining what constitutes an adverse impact on a wetland is a technically complex issue. [citation omitted] Inland wetlands agencies commonly rely on expert testimony in making such a finding. [citation omitted] Our careful review of the record in the present case, however, does not reveal that any of the experts opined that the plaintiff’s soil mixing plan would result in any adverse impact to a wetland or watercourse. No expert expressed any opinion regarding whether the possible transport of pesticides into wetlands from the soil remediation would have any significant or adverse impact on the wetlands. [citation omitted].”

Toll Brothers, Inc. v. Bethel Inland Wetland Commission, 101 Conn. App. 597, 600 (2007) (overturning a denial of a wetlands permit):

“ ‘[I]n reviewing an inland wetlands agency decision made pursuant to [its regulations], the reviewing court must sustain the agency’s determination if an examination of the record discloses evidence that supports any of the reasons given. . . . The evidence, however, to support any such reason must be substantial; [t]he credibility of witnesses and the determination of factual issues are matters within the province of the administrative agency. . . . This so-called substantial evidence rule is similar to the sufficiency of the evidence standard applied in judicial review of jury verdicts, and evidence is sufficient to sustain an agency finding if it affords a substantial basis of fact from which the fact in issue can be reasonably inferred. . . . The reviewing court must take into account [that there is] contradictory evidence in the record . . . but the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency’s finding from being supported by substantial evidence. . . . Evidence of general environmental impacts, mere speculation, or general concerns do not qualify as substantial evidence.’ . . . River Bend Associates, Inc. v. [Simsbury] Conservation & Inland Wetlands Commission, 269 Conn. 57, 70-71, 848 A.2d 395 (2004) [citing to Tarullo v. Inland Wetlands & Watercourses Commission, 263 Conn. 572, 584 (2003), Samperi v. Inland Wetlands Agency, 226 Conn. 579, 587-588 (1993), and Connecticut Fund for the Environment, Inc. v. Stamford, 192 Conn. 247, 250 (1984)].”

Finley v. Orange Inland Wetlands Commission, 289 Conn. 12, 38-39 (2008) (overturning the granting of a wetlands permit in an action brought by plaintiff intervenors opposing the proposed activity):

“As long as a search of the record reveals the basis for the agency’s decision consistent with the substantial evidence standard . . . then the reviewing court must infer that the local wetlands [agency’s decision should be sustained]. . . . Courts must be scrupulous not to hamper the legitimate activities of civic administrative boards by indulging in a microscopic search for technical infirmities in their actions.”

Unistar Properties, LLC v. Putnam Conservation and Inland Wetlands Commission, 293 Conn. 93, 103, 113 (2009) (upholding the commission’s denial of a wetland permit in an action brought by a developer wishing to create a residential subdivision).

“We affirm the judgment of the trial court on the ground that substantial evidence existed to show that the plaintiff’s application was incomplete and that this was a proper basis on which to deny the application.

....  
...[T]he plaintiff carries the burden of proof to show the challenged action is not supported by the record. [citation omitted]. The plaintiff must do more than simply show than another decision maker, such as the trial court, might have reached a different conclusion. Rather than asking the reviewing court to retry the case de novo ... the plaintiff must establish that substantial evidence does not exist in the record as a whole to support the agency’s decision.”

The Court in Unistar Properties, 293 Conn. at 106-107, also discussed the preamble or purposes section of the inland wetlands and watercourses act, noting, with a conclusion:

“The legislature has set forth a statement of public policy and specific legislative findings recognizing the importance of, and rationale for, ‘pre-serv[ing] the wetlands and ... prevent[ing] the despoliation and destruction thereof’ because of the adverse consequences arising from the loss of wetlands resources. General Statutes § 22a-28. [citing to the coastal wetlands statute as evidence of the legislature’s purpose for the inland wetlands act]. The act specifically recognizes that these resources are important .... Noting the underlying fragility of wetlands and watercourses resources, the legislature expressly stated that it is ‘the purpose of [the act] ... to protect the citizens of the state by making provisions for the protection, preservation, maintenance and use of the inland wetlands and watercourses ....”

Thus, the state Supreme Court has addressed the issues in the “enhancements” bill. If the legislature changes the law, the courts will presume the legislature meant something different than what it has already proclaimed.